

United States Court of Appeals for the Tenth Circuit

OFFICE OF THE CLERK
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Patrick J. Fisher, Jr.
Clerk of Court

Douglas E. Cressler
Chief Deputy Clerk

MEMORANDUM

TO: Interested Persons

FROM: Patrick Fisher (303) 844-3157

DATE: July 6, 2005

RE: Proposed Rule Changes

Attached are proposed changes to the Tenth Circuit Rules. They are circulated for public comment. *See* 28 U.S.C. § 2071(b). Comments may be mailed to the clerk at the address above or you may make a comment on our website www.ca10.uscourts.gov under Rules & Forms.

The proposed changes are in red.

The court proposes to increase the number of copies required throughout the rules.

10th Cir. R. 22 and new 10th Cir. R. 24 – The proposed amendments incorporate the General Order of October 1, 1996.

See http://www.ca10.uscourts.gov/general_orders/generalorder1.pdf

10th Cir. R. 8.2(A)(4) – The clerk frequently needs to call opposing counsel about a response.

10th Cir. R. 25 – Adopts the required electronic filing language of proposed Fed. R. App. P. 25(a)(2)(D).

10th Cir. R. 27.2(A)(1) – Avoids a potential conflict between a local rule and a FRAP rule.

10th Cir. R. 27.2(d) – Incorporates the *Hahn* rule, *See* 359 F.3d 1315 (10th Cir. 2004).

New 10th Cir. R. 29 – Avoids recusal problems.

10th Cir. R. 46.1(C) – Requires address information be updated.

Addendum I Criminal Justice Act Plan – Creates an appellate panel for appointment of counsel when trial counsel is relieved. The entire Plan is new.

Addendum II Plan for Appointment of Counsel in Special Civil Appeals – Removes requirement for a motion to be on file.

Addendum III - Plan for Attorney Disciplinary Enforcement – Minor modifications.

10th Cir. R. 3.4 Docketing statement.

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- (B) **Number of copies.** An original and ~~4~~7 copies of the docketing statement must be filed.

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10th Cir. R. 8

8.2 Emergency or ex parte motions

- (A) **Emergency relief.**

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(3) the time and date the order becomes effective~~;~~,

(4) the telephone numbers and electronic mail addresses, if available, of opposing counsel.

10th Cir. R. 15

- 15.1 Docketing statement.** Within 14 days after filing a petition for review or an application for enforcement, the filing party must file an original and ~~4~~7 copies of a docketing statement on a form provided by the court.

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10th Cir. R. 22

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- (C) **Proceedings in District Courts.** The district court must consider the propriety of issuing a certificate of appealability in the first instance. Failure of the district court to issue a certificate of appealability within thirty days of filing the notice of appeal shall be deemed a denial.
- (D) **Briefing.** Respondent-appellees shall not file a brief until requested to do so by this court.

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22.4 Motions for Leave to File Second or Successive Habeas Petition

All motions for leave to file a second or successive habeas petition must be accompanied by the petition that is proposed to be filed.

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10th Cir. R. 24

24.1 Prison Litigation Reform Act

All prisoners bringing civil actions or appeals shall pay the full amount of the filing fee. 28 U.S.C. § 1915(b)(1). Consequently, if a prisoner tenders no filing fee, or less than the full fee, when a notice of appeal is filed, the district court shall obtain sufficient information to determine the prisoner's eligibility for, and make the assessment of, a partial filing fee under the Act. If the prisoner has sufficient funds, the entire filing fee shall be assessed immediately. The partial fee determination must take place regardless of whether the prisoner's status was examined at the time the complaint or other initial pleading was submitted to the district court. The appeal should be processed and submitted to this court in the normal course, as required by Federal Rule of Appellate Procedure 3(d), without waiting for the determination of the prisoner's eligibility for paying less than the full filing fee. When the district court makes its determination, it shall enter an order and send a copy to this court. If the in forma pauperis application reveals that the prisoner has no assets and no means to pay an initial partial filing fee, 28 U.S.C. § 1915(b)(4), the district court's determination order must reflect that finding.

24.2 Duty of Prisoner Appellant

The appellant shall authorize the custodian to deduct payments from the institutional account and the custodian will pay the assessment. Notice shall be given to this court if the prisoner does not provide the information required under the Act or does not authorize payment from his or her institutional account. Filing fee payments shall be made to the clerk of the district court pursuant to Fed. R. App. P. 3(e).

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10th Cir. R. 25

25.1 Electronic Filing. As authorized by Fed. R. App. P. 25(a)(2)(D), the court adopts an Electronic Case Filing system. Cases may be designated for inclusion in the system by case type or by the particular case or cases. All papers, except the initial petition in an original proceeding, filed in cases included in the system must be filed electronically in compliance with procedures adopted by the court and maintained by the clerk.

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27.2 Summary disposition on motion by a party or the court.

(A) Motions to dismiss or affirm.

(1) Types. A party may file only the following dispositive motions:

- (a) a motion to dismiss the entire case for lack of appellate jurisdiction **or as authorized by Fed. R. App. P. 31(c) or 42(b);**
- (b) a motion for summary disposition because of a supervening change of law or mootness; **or**
- (c) a motion to remand for additional trial court or administrative proceedings; **or**
- (d) **a motion to enforce a plea agreement (attach copies of the plea agreement and the transcripts of the plea hearing and sentencing hearing).**

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(B) Action by the court. After giving notice to the parties, the court may summarily dispose of an appeal or a petition for review or enforcement.

- (1) Memorandum briefs.** The court may require parties to file memorandum briefs addressing specific dispositive issues.
- (2) Copies.** An original and ~~4~~**11** copies of a memorandum brief must be filed. Pro se litigants may file a memorandum brief on a form provided by the court.

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10th Cir. R. 29

29.1 Amicus Briefs on Rehearing. The court will receive but not file proposed amicus briefs on rehearing. Filing will be considered shortly before the oral argument on rehearing en banc if granted or before the grant or denial of panel rehearing.

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10th Cir. R. 31

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31.5 Number of copies. A party (or an amicus) must file an original and 711 copies of briefs and supplemental authorities. Counsel may be required to furnish additional copies if needed.

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46.1 Entry of appearance.

(A) **Attorneys.** Within 10 days after an appeal or other proceeding is filed, counsel for the parties must file written appearances in a form approved by the court (*see* Appendix A, Form 2). Other attorneys whose names subsequently appear on filed papers must also file written appearances. Attorneys who authorize their names to appear on filed papers have entered an appearance. After an appearance is entered, attorneys are responsible for the contents of all papers filed in their names. Attorneys who appear in a case in this court may not withdraw without a court order.

(B) **Pro se.** A party wishing to appear without counsel must notify the clerk in writing by filing an entry of appearance on a form approved by the court (*see* Appendix A, Form 3).

(C) **Change of Address.** Once an appearance has been entered, the clerk must be notified of any change of address.

(~~E~~D) **Certification of interested parties.**

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47.3 Judicial conference.

- (A) **Authorization.** As ~~required~~ **permitted** by 28 U.S.C. § 333, a judicial conference ~~will~~ **may** be convened every other year, at a time and place designated by the chief judge, or at another court-determined interval that the law permits. In alternate years, the circuit may hold a conference for judges only.

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10TH CIR. FORM 2. ENTRY OF APPEARANCE AND CERTIFICATE OF INTERESTED PARTIES

UNITED STATES COURT OF APPEALS
THE TENTH CIRCUIT

ENTRY OF APPEARANCE AND
CERTIFICATE OF INTERESTED
PARTIES

v.

No.

INSTRUCTIONS: COUNSEL FOR A PARTY MUST EXECUTE AND FILE AN ORIGINAL AND ~~THREE SIX~~ COPIES OF THIS FORM, WITH PROOF OF SERVICE ON ALL OTHER PARTIES. MULTIPLE COUNSEL APPEARING FOR A PARTY OR PARTIES AND WHO SHARE THE SAME MAILING ADDRESS MAY ENTER THEIR APPEARANCES ON THE SAME FORM BY EACH SIGNING INDIVIDUALLY.

The undersigned attorney(s) appear(s) as counsel for _____
_____, Appellant/Petitioner or
Appellee/Respondent.

Please check one:

☐ Attached to this form is a completed certificate of interested parties and/or attorneys not otherwise disclosed, who are now or have been interested in this litigation or any related proceeding. (**FILE ORIGINAL AND ~~THREE SIX~~ COPIES.**)

☐ There are no such parties, or any such parties have been disclosed to the court. (**FILE ORIGINAL AND ~~THREE SIX~~ COPIES ALSO.**)

Name of Counsel
(type or print)

Name of Counsel

Signature of Counsel

Signature of Counsel

Mailing Address

Mailing Address

Telephone Number

Telephone Number

I hereby certify that a copy of this Entry of Appearance and Certificate of
Interested Parties was mailed on _____
(please insert date)

to _____
(See Fed. R. App. P. 25 (b))

(Signature)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CERTIFICATE OF INTERESTED
PARTIES

v.

No.

The following are parties to this litigation, including persons or other entities financially interested in the outcome of the litigation, but not revealed by the caption on appeal, see 10th Cir. R. 46.1, and attorneys not entering an appearance in this court who have appeared for any party in prior trial or administrative proceedings sought to be reviewed, or in related proceedings that preceded the subject action in this court:

(Attach additional pages if necessary.)

Signature

Name (type or print)

Mailing Address

City State Zip Code

Area Code/Telephone No.

10TH CIR. FORM 3. ENTRY OF APPEARANCE — PRO SE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ENTRY OF APPEARANCE
PRO SE

v.

No.

INSTRUCTIONS: A PARTY WHO APPEARS WITHOUT COUNSEL MUST NOTIFY THE CLERK BY COMPLETING AND SIGNING THIS FORM AND FILING AN ORIGINAL AND **THREE SIX** COPIES. THE FEDERAL RULES OF APPELLATE PROCEDURE AND TENTH CIRCUIT RULES REQUIRE THAT ALL PAPERS SUBMITTED TO THE COURT FOR FILING BE SIGNED BY THE FILING PARTY AND THAT COPIES BE SERVED ON OPPOSING PARTIES OR THEIR ATTORNEY. THE ORIGINAL OF EVERY PAPER SUBMITTED FOR FILING MUST CONTAIN PROOF OF SERVICE IN A FORM SIMILAR TO THAT ON THE REVERSE OF THIS FORM. ANY PAPER THAT DOES NOT CONTAIN THE REQUIRED PROOF OF SERVICE MAY BE DISREGARDED BY THE COURT OR RETURNED.

ADDENDUM I

CRIMINAL JUSTICE ACT PLAN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PREAMBLE

Pursuant to the Criminal Justice Act (Act), 18 U.S.C. § 3006A(b), the court adopts the following plan for furnishing representation in criminal cases on appeal. This amends the plan adopted by the Circuit Council on February 11, 1971 and which was last amended on January 1, 1996. When requested representation will be provided to every person who is entitled to representation under the Act.

I. Appointment of Counsel in the Tenth Circuit

Absent a change in financial conditions, any determination that a person is eligible for Criminal Justice Act counsel made in the district court shall continue on appeal. In its discretion, the court of appeals may appoint the attorney who represented the eligible person in the district court, the special appellate division of the Federal Public Defender's office for the District of Colorado, another Federal Public Defender's office from the circuit, or it may appoint a lawyer from the court's Criminal Justice Act Panel.

Appointed counsel must continue to represent the appellant until relieved by the court of appeals. 10th Cir. R. 46.2.1. If filed in compliance with Tenth Circuit local rule 46.4(A), trial counsel's request to be relieved from representation on appeal shall be given due consideration. While the court recognizes there may be benefits to maintaining continuity of counsel, it also recognizes that the skills necessary to proceed as appellate counsel may differ from those required for trial counsel. Substitution of counsel shall not reflect negatively in any way on the conduct of the lawyer involved. The court will require, however, that trial counsel perfect the appeal prior to seeking withdrawal.

II. Composition of Panel of Private Attorneys

A. Criminal Justice Act Panel

The Court will establish a panel of private attorneys (the CJA Panel) who are eligible and willing to accept appointments in cases where representation is required under 18 U.S.C. §3006A. These attorneys, along with the lawyers from the Appellate Division of the Federal Public Defender's Office for the District of Colorado, shall constitute the core group from which appointments shall be made. The Court shall approve private attorneys for

membership on the CJA Panel after receiving recommendations from the Standing CJA Committee, established pursuant to Section III of this Plan.

B. Size

The CJA Panel will not have a size limitation, but will include adequate attorney representation from each of the districts in the circuit. The Standing Committee will view applications for membership on the panel with an eye towards identifying qualified appellate counsel from each state in the Tenth Circuit.

C. Eligibility

To be eligible for service on the CJA Panel, lawyers must be members of the Tenth Circuit bar in good standing. They must certify that they have a working knowledge of the Federal Rules of Appellate Procedure and federal criminal law. Counsel on the list must be willing to accept at least one CJA appellate appointment each year.

D. Term of Service

There are no fixed terms for panel membership. Lawyers will remain on the panel until they resign or are removed in accordance with the procedure established in section II(G).

E. Application for Membership

Applications for membership on the panel will be available in the office of the Clerk of Court and on the circuit's website at www.ca10.uscourts.gov. Completed applications must be submitted to the Clerk of Court for transmittal to the court's Standing Committee on the Criminal Justice Act.

F. Maintenance of the List

The Clerk of Court shall maintain a public list in the clerk's office of the members of the CJA Appellate Panel, including current street and email addresses and telephone numbers.

G. Removal from the Panel

The court is very appreciative of the time and commitment required to accept appellate appointments. Membership on the panel is not a property right, however, and the refusal to accept appointments on a consistent basis will lead the court to assume the lawyer has

resigned from the panel. Counsel will be notified in writing of any change in status resulting from the failure to accept appointments. The Standing Committee may also recommend removal from the panel for other reasons. That recommendation must be in writing and will be forwarded to the court for consideration. If the court decides to accept the recommendation, counsel will be given notice of the proposed basis for removal and will be provided an opportunity to respond in writing. The court of appeals will make all final decisions regarding removal. If a panel attorney is removed, he or she will receive a letter of explanation from the court. Any attorney whose resignation is assumed because he or she has not accepted cases may file a request to return to active status. The request must include an explanation regarding the refusal to accept appointments. The Standing Committee will make a recommendation to the court on those types of requests. Attorneys removed for any other reason may file a renewed application no earlier than one year from the date of removal. In the application, counsel must note the earlier removal and explain why they believe they should be allowed to return to the panel.

III. Standing Committee On The Criminal Justice Act

A. Membership and Structure

The Chief Judge, or the Chief Judge's delegate, shall appoint the Standing Committee. It shall be composed of two lawyers from Oklahoma, and one lawyer each from the remaining states in the circuit. Members may be private attorneys or lawyers from the various Federal Public Defenders' offices. These attorneys shall serve staggered three year terms, and may serve two consecutive terms. In addition to these seven members, the Federal Public Defender for the Districts of Colorado and Wyoming shall be a permanent member of the Standing Committee. One of the other positions on the Committee must be filled with one of the other Federal Public Defenders from the circuit. The Chief Judge may also appoint a liaison to the Committee from the court's legal staff. That person will not be a Committee member, but will be available to both the court and members for committee support and consultation.

B. Duties

The Standing Committee shall review the qualifications of applicants for the panel, conduct further inquiries as may be indicated, and shall make recommendations to the court of appeals for placement of lawyers on the panel. The Standing Committee shall also review the operation of the appellate panel on a periodic basis and shall make recommendations to the court regarding any necessary changes. This review may include investigation of complaints concerning panel attorneys. The Committee may make recommendations regarding removal of a lawyer from the list to the court of appeals. The Standing

Committee's recommendations to the court shall remain confidential. The CJA Panel list, however, will be public information.

IV. Change In Financial Conditions

If a party becomes financially unable to employ counsel on appeal, a motion seeking a finding that the party is eligible for the appointment of counsel must be made in district court. See 18 U.S.C. § 3006A. Because the district court must make factual findings regarding the defendant's financial eligibility, appropriate forms, particularly a CJA 20 form, should be filed in that court first. Upon issuance of an order finding the person financially eligible, counsel may file a motion in this court for appointment of counsel under the statute. The court may, at any time, examine or re-examine the financial status of the defendant. If a court finds that the defendant is financially able to obtain counsel or make partial payments for representation, the court may deny or terminate an appointment pursuant to subsection (c) of the Act or require partial payment to be made pursuant to subsection (f) of the Act.

V. Death Penalty Cases

Pursuant to the Guidelines for Administration of the Criminal Justice Act, the court may, in an appropriate death penalty case, appoint and compensate under the Act an attorney or attorneys from a state or local public defender organization or from a legal aid agency or other non-profit organization.

VI. Petition For Writ of Certiorari

If the judgment of this court is adverse to the client, counsel must inform the client of the right to petition the Supreme Court of the United States for a writ of certiorari. Counsel must file a petition for a writ of certiorari if the client requests that such a review be sought, and, in counsel may file a petition for a writ of certiorari when, in counsel's considered judgment, there are grounds for seeking Supreme Court review that are not frivolous and are consistent with the standards for filing a petition contained in the Rules of the Supreme Court and applicable case law. If, on the other hand, the client requests that counsel file a petition for a writ of certiorari and, in counsel's considered judgment, there are no such grounds for seeking Supreme Court review that are non-frivolous and for filing a petition contained in the Rules of the Supreme Court and applicable case law, counsel should promptly so advise the client and submit to this court a written motion for leave to withdraw from the representation with this court promptly after the entry of judgment. If this court grants counsel's motion and terminates counsel's appointment, counsel must so advise the client in writing as soon as possible. The writing shall also advise the client of his or her right to file a pro se petition for a writ of certiorari.

VII. QUALITY OF REPRESENTATION

Attorneys appointed pursuant to any provisions of the Act must conform to the highest standards of professional conduct, including, but not limited to, the provisions of the American Bar Association's Code of Professional Responsibility.

VIII. COMPENSATION

A. Claims

All claims for compensation and expenses must be submitted to the clerk, on the voucher enclosed with the appointment, at the conclusion of the representation. All claims must be supported by appropriate documentation. In each case, the court will fix the compensation to be paid the attorney as provided in the Act. Counsel appointed in direct criminal appeals and non-death penalty § 2254 and § 2255 matters should review the Court's general *Advice To Counsel* letter for detailed information and guidelines regarding compensation issues. Counsel appointed in death penalty matters should review the court's separate *Death Penalty Advice To Counsel* letter. Copies of those letters may be obtained from the Clerk of Court. See www.ca10.uscourts.gov/cja.cfm

Although the Act provides for limited compensation, the court recognizes that the compensation afforded often does not reflect the true value of the services rendered. Consequently, it is the court's policy not to cut or reduce claims which are reasonable and necessary. If the court determines a claim must be cut it will provide the attorney notice and an opportunity to cure the defect.

B. Other Payments

Except as authorized or directed by the court, no appointed attorney and no person or organization authorized by the court to furnish representation under the Act may request or accept any payment or promise of payment for representation of a defendant.

IX. Application of Guidelines

Appointment of counsel under the Act will be governed generally by the Guidelines for Administration of the Criminal Justice Act. VII Guide to Judiciary Policies and Procedures, Appointment of Counsel in Criminal Cases, Section A.

ADDENDUM II

PLAN FOR APPOINTMENT OF COUNSEL IN SPECIAL CIVIL APPEALS

PURPOSE:

To provide representation in special cases for persons who are financially unable to obtain the services of counsel.

CRITERIA:

Under this plan, the court may appoint counsel to represent a party or parties to a civil matter pending before the court when:

1. the person is financially unable to obtain the services of counsel;
2. the person is not entitled to appointed counsel under the provisions of the Criminal Justice Act or other source of legal assistance;
- ~~3. the person has requested appointment of counsel;~~
- ~~3~~ 3. the litigation presents complex and significant legal issues, the outcome of which may have wide impact;
- ~~5~~ 4. it is manifestly clear that the services of counsel are necessary for the effective presentation of the issues to the court; and
- ~~4~~ 5. the interests of justice require that counsel be assigned to assist the litigant who would otherwise be compelled to proceed *pro se*.

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ADDENDUM III

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PLAN FOR ATTORNEY DISCIPLINARY ENFORCEMENT

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Section 6. Initiation of Disciplinary Proceedings.

6.1 Upon the receipt of a copy of a judgment, order, or other court document demonstrating that an attorney has been convicted of a serious crime, has been either suspended or disbarred or reprimanded by another court, or has resigned from the bar of another court during the pendency of a misconduct investigation, the clerk ~~with the approval of the chief judge or the chief judge's designee will~~ shall issue an order directing the attorney to show cause why the court should not impose upon the attorney the discipline described in Section 3. With the order to show cause, the clerk also may send a copy of the judgment of conviction or disciplinary judgment, order, or other court document indicating the form of disciplinary action.

6.2 When misconduct or allegations of misconduct concerning the appellate process which, if substantiated, would warrant discipline on the part of an attorney comes to the attention of the clerk or a judge, whether by complaint, grievance, or otherwise, ~~the matter will be referred to the disciplinary panel for investigation and formal disciplinary proceeding or formulation of such other recommendation as the disciplinary panel deems appropriate. If the disciplinary panel determines that cause may exist for disciplinary action, the panel will direct~~ the clerk ~~will~~ shall issue an order to show cause why discipline should not be imposed by this court. The order will set forth the alleged conduct, which is the subject of the proceeding and the reason the conduct may justify such discipline. If the disciplinary panel determines that cause does not exist for disciplinary action, the proceeding will be dismissed with appropriate notice.

6.3 All orders to show cause under this section ~~will~~ require the attorney to respond within twenty (20) days. ~~and the clerk will furnish a copy of this plan to the attorney.~~ In the response to the order to show cause, the attorney must include a declaration of the other bars to which the attorney is admitted. ~~The clerk shall furnish a copy of this plan to the attorney.~~

Section 7. Uncontested Proceedings.

7.1 If an attorney fails to timely respond to an order to show cause the clerk will notify the chief judge or the chief judge's designee. The ~~judge panel~~ may then direct entry of an order imposing discipline as indicated.

7.2 Any attorney who is the subject of an investigation by this court into allegations of misconduct may consent to disbarment by filing with the clerk an affidavit stating that the attorney desires to consent to disbarment. ~~Resignation from the bar of this court while a disciplinary proceeding is pending – after the clerk has issued an order to show cause – is consent to disbarment.~~